Magnesium Casting Company, Inc. *and* United Electrical, Radio and Machine Workers of America (UE) Local 262. Case 1-CA-16886

November 30, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 15, 1980, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The facts, as more fully set forth by the Administrative Law Judge, show that Respondent hired Lawrence Thomas as a die-cast machine operator in October 1978. In March 1979, Thomas was the leader of a brief work stoppage. In addition, Thomas openly distributed union literature at Respondent's plant. Throughout the spring and early summer of 1979, Thomas requested a transfer to the die maintenance department. Respondent granted Thomas' request and transferred him in July 1979. Respondent laid off Thomas on November 27, 1979. The layoff occurred only 1 day after Thomas engaged in protected activity by again distributing leaflets to Respondent's employees.

In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board stated that in 8(a)(3) discharge cases the General Counsel must first "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" and "[o]nce this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."

Here, the evidence produced by the General Counsel, and cited by the Administrative Law Judge, warrants an inference that Thomas' protected conduct caused his discharge. Thus, Thomas' open union activity, the precipitous nature of the layoff, and Respondent's earlier unlawful conduct lend support to establishing the General Counsel's *prima facie* case. Nonetheless, we find that Respondent rebutted the General Counsel's evidence and met its burden, under *Wright Line*, of demonstrating that the layoff would have occurred even absent Thomas' protected conduct. As recited more fully by the Administrative Law Judge, Respondent, in support of its economic defense, clearly established that: (1) Thomas received a requested transfer subsequent to his protected activities in March 1979; (2) the first shift in the die maintenance department where Thomas worked had regularly been staffed by one employee who was senior to Thomas; (3) there was a need for a layoff in die maintenance and Respondent, since June 1979, had been laying off employees. In fact, Thomas was only 1 of 33 employees laid off during Respondent's reduction of its production and maintenance work force; (4) the layoff was made in conformity with preexisting and customary standards; and (5) no one was hired to replace Thomas.[2]

The Administrative Law Judge concluded that "the sum of Respondent's economic evidence is impressive." Nevertheless, the Administrative Law Judge concluded that Respondent's asserted defense was "pretextual."

In *Limestone Apparel Corp.*, 255 NLRB 722 (1981), we noted that "a finding of pretext necessarily means that the reasons of the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel."

Here, it is beyond dispute that Respondent's proffered economic reasons for the layoff, in fact, existed. Indeed, the Administrative Law Judge stated that "[t]he evidence establishes the need for a layoff in die maintenance." As noted, Respondent presented compellng and substantial evidence that economic conditions forced a significant cutback in its production and maintenance work force.[3]

Contrary to the Administrative Law Judge, we cannot conclude that the economic reasons were not relied upon by Respondent in deciding to lay off Thomas. Neither specific evidence adduced by

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Later, in April 1980, a promotion created a vacancy in the die maintenance department. The parties stipulated that Thomas, in April 1980, received a *bona fide*, unconditional offer of reinstatement, which he declined.

[3] Before Thomas' transfer, the die maintenance department was staffed by one worker per shift. At the time of the transfer, the department had a backlog in its work. However, when Thomas' layoff occurred, the backlog had diminished. Richard Courtois, the senior die maintenance employee who worked with Thomas on the first shift, confirmed that it was "not busy at all" in the die maintenance department at the time of Thomas' layoff.

the General Counsel[4] nor the record as a whole warrants a finding that Respondent's economic reasons were not genuine and served only to mask Respondent's antiunion reasons. Respondent specifically established the need for a layoff in the die maintenance department—where Thomas was the least senior and least experienced employee.

Further, as previously noted, Thomas engaged in substantial protected activities in March 1979. Additionally, though not specifically alluded to by the Administrative Law Judge, Thomas' leafletting of November 26 did not constitute the first time he enaged in such activity. Rather, Thomas acknowledged that, after March 1979, he had leafletted and posted union notices on six or seven occasions at Respondent's gate as well as in the shop. However, his employment was not adversely affected by his earlier protected activities and, in fact, he subsequently received the transfer he had requested. This factor, to an extent, undercuts the General Counsel's contention that Respondent was motivated by antipathy to Thomas' protected activities, and bolsters Respondent's economic defense.

The General Counsel has the burden of proving, by a preponderance of the credited evidence, that a respondent acted on the basis of improper motivation in disciplining or discharging an alleged discriminatee. In light of Respondent's unrebutted showing that legitimate business considerations caused it to lay off Thomas, the General Counsel failed to carry the burden of proof, and thus the complaint must be dismissed as to the alleged 8(a)(3) violation in the layoff of Thomas.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Magnesium Casting Company, Inc., Hyde Park, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(a), reletter subsequent paragraphs accordingly, and substitute the following for paragraph 1(c):

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Delete paragraphs 2(a) and (b), and reletter the subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT tell you to keep a low profile regarding the exercise of any of the rights described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you because you engage, or refuse to engage, in any of the protected activities described at the top of this notice.

MAGNESIUM CASTING COMPANY, INC.

DECISION

NORMAN ZANKEL, Administrative Law Judge: This case was heard before me on June 24 and 25, 1980 in Boston, Massachusetts.

Upon a charge filed on November 29, 1979,[1] by United Electrical, Radio and Machine Workers of Amer-

[4] Unlike the Administrative Law Judge, we find no basis in the record for concluding that Respondent's reasons for selecting November 27 as the date for Thomas' layoff were "unconvincing." The Administrative Law Judge surmised that Respondent's permitting the need for layoff in die maintenance to become "critical" would demonstrate a lack of "business acumen" by Respondent's officials. However, it was not shown that Thomas' layoff was decided upon or implemented in a fashion or manner different from Respondent's other numerous layoffs. We would not—on the basis that it showed a lack of "business acumen"—question the date selected by Respondent for the layoff.

[5] We will also substitute a narrow cease-and-desist order for the broad one in the recommended Order (see *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979)), and will conform the notice accordingly.

[1] All dates hereinafter are 1979 unless otherwise indicated.

ica (UE) Local 262 (the Union), Robert S. Fuchs, Regional Director for Region 1 of the National Labor Relations Board, issued a complaint and notice of hearing on January 18, 1980, against Magnesium Casting Company, Inc. (Respondent).[2]

The complaint alleges that Respondent engaged in violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act). Specifically, it is alleged that Respondent interfered with, restrained, and coerced its employees by warning an employee, Lawrence Thomas, to keep a "low profile" in his union activities, and discriminatorily laid off Thomas on November 27.

Respondent filed a timely answer to the complaint. The answer admitted certain matters but denied the substantive allegations and that Respondent committed any unfair labor practice.

All parties appeared at the hearing. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and meet material evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. I have carefully considered the contents of the briefs filed on behalf of the General Counsel and Respondent.

Upon consideration of the entire record and the briefs, and my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent, a Massachusetts corporation, maintained its principal office and place of business in Hyde Park, Massachusetts, at all material times. At that location, Respondent, at all material times, has been engaged in the manufacture, sale, and distribution of castings, electrical fixtures, and related products.

In the course of its business, Respondent caused large quantities of metal used by it in its manufacturing process to be purchased and transported in interstate commerce from and through various States of the United States other than Massachusetts. During the calendar year immediately preceding issuance of the complaint, Respondent derived gross revenue in excess of $50,000 from the sales of castings, electrical fixtures and related products which it manufactured.[3]

Respondent admits, the record reflects, and I find it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The parties agree, the record reflects, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

[2] The caption of an earlier case (250 NLRB 692 (1980)) bears the designation "Inc." in the employer's name. The pleadings in the instant case omit the corporate reference. Nonetheless, Respondent herein clearly is the same party as respondent in the matter decided by the Board. Assuming the earlier case caption more directly identifies Respondent, I hereby amend the name of Respondent in the instant case to read "Magnesium Casting Company, Inc."

[3] The parties stipulated to the dollar volume of Respondent's business by way of a post-trial written stipulation which is hereby received in evidence as ALJ Exh. 1.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Thomas began working for Respondent on October 2, 1978. He worked continuously until November 27, 1979. On the latter date, Thomas was laid off.

Thomas worked as a die-cast machine operator until July 1979. He was then transferred, at his request, to a die maintenance job.

As a die-cast machine operator, Thomas was paid $4.69 per hour, plus an incentive rate of 125 percent. He received a $5-per-hour wage rate upon transfer. Thomas' wage rate was $5.43 per hour at the time of his layoff.

There is a distinction between die-*cast* maintenance and die maintenance. The former involves operation of die-cast machines. The latter job requires an employee to work on the dies which are placed into the die-cast machines. Thus, die maintenance work includes such functions as changing, repairing, painting, cleaning, and storing dies.

For at least 2 years before the incidents herein, only one or two employees regularly had been assigned to work in the die maintenance department. In February, a third employee, Gartman, was added to that department. Gartman worked in that department until the week ending July 22. Gartman then quit.

Throughout the spring and early summer, Thomas made several requests of Respondent's personnel manager, Ray Nichols, for transfer into die maintenance. Thomas was transferred to replace Gartman.

In March, Thomas was a leader of a brief work stoppage of the die-cast maintenance employees. Those employees stopped working to protest a change in Respondent's computation of the incentive rate and elimination of relief personnel. Thomas was a spokesman for the employees who stopped work. He met with Die-Cast Manager Mal Emack to discuss the problems.

On January 5, 1978, a Board complaint issued against Respondent. The complaint alleges Respondent had engaged in unfair labor practices in violation of Section 8(a)(1), (3), (4), and (5) of the Act. A hearing was conducted by Administrative Law Judge Abraham Frank. On November 20, 1979, Administrative Law Judge Frank issued his decision. Respondent was found to have violated the Act by engaging in unlawful interrogation; threatening employees with plant closure, discharge, and other economic reprisals; creating impressions that employees' union activities were under surveillance by Respondent; suggesting to employees that they testify in Respondent's interest at a Board proceeding; threatening employees with severe punishment if they attended a Board hearing; coercively directing employees not to sign union authorization cards; soliciting employees not to sign union cards or attend union meetings; promising economic benefits contingent on defeat of the Union's organizational efforts; promulgating and maintaining an unlawful no-solicitation-distribution rule and discriminatorily implementing it; discriminatorily discharging two leading union adherents one of whom was the principal initiator of union activity; discriminatorily suspending

employees; discriminatorily giving employees less remunerative work; and denying them overtime.

Administrative Law Judge Frank's findings and conclusions have been affirmed by the Board.[4] Thus, the Board issued a cease-and-desist order addressed to the above violations and provided a remedy for the various instances of discriminatory conduct. Additionally, the Board ordered Respondent to recognize and bargain with the Union as exclusive representative of Respondent's production and maintenance employees. Further, the Board issued a broad proscriptive cease-and-desist order.

On November 26, Thomas, two union organizers and Leonard Lamkin distributed leaflets to employees coming to work.[5] Those leaflets announced the issuance of Administrative Law Judge Frank's decision.

Thomas testified that Plant Manager Harry C. Thornton drove by the gate during Thomas' leafleting activity on November 26. Thornton testified he did not recall seeing Thomas at the gate that day. This testimonial conflict needs no resolution. The testimony of Union Organizer Philip Mamber remains uncontradicted that Thornton and other supervisors passed through the gate when Thomas was engaged in distributing the Union's literature. Mamber's testimony is that he saw Supervisors Gangini and Herb Davis, in addition to Thornton at the gate that morning. There is evidence that Thomas met and spoke with Mamber at various times at the gate since March. Thomas solicited other employees' signatures on union authorization cards. However, that activity was negligible. He testified he signed up only three or four employees. (The Union's organizing campaign took place in 1977. See 250 NLRB 692.) This was before Thomas began to work for Respondent. Nonetheless, Thomas was outspoken at departmental meetings in his pursuit of improved safety, health, and wage issues. Nichols presided at those meetings.

B. *Interference, Restraint, and Coercion*

1. Facts[6]

It is alleged that, sometime in June, Nichols interfered with, restrained, and coerced employees by telling an employee he should keep a low profile regarding his union activities.

This allegation emanates from one of the conversations between Thomas and Nichols during which they discussed the possibility of Thomas' transfer. Specifically, Thomas testified that he and Nichols discussed those possibilities sometime in June. According to Thomas, Nichols told Thomas that transfer possibilities were good, but Thornton and Emack had reservations about Thomas being a troublemaker. Thomas asserted Nichols said, "[I]t would be in his [Thomas'] best interest if he [Thomas] were to keep a low profile regarding union activities." Further, Thomas testified Nichols said he would deny making such a statement. Finally, Thomas claimed Nichols explained the term "troublemaker" referred to Thomas' various conversations with Mamber at the plant gate.

Nichols testified he spoke with Thomas in June concerning the transfer. Nichols appeared as a witness on behalf of Respondent. He recalled speaking with Thomas in June concerning the transfer. The complete text of Nichols' testimony regarding the alleged unlawful comment follows:

> Q. (By Mr. Corcoran): Did you ever tell Mr. Thomas that the possibility for a transfer looked good but that Emack and Thornton had reservations about moving a troublemaker into die maintenance and that it was in Thomas' best interest to keep a low profile regarding union activities?
>
> A. Not *really*. Nobody's ever mentioned anything about being a troublemaker. He [Thomas] was never known as a troublemaker. [Emphasis supplied.]
>
> Q. Did you ever say *that* to Mr.—[Emphasis supplied].
>
> A. No, I didn't.
>
> Q. And you never told Mr. Thomas that you deny ever having said *that*? [Emphasis supplied.]
>
> A. No.

I credit Thomas. His account of the June conversation was direct, forthright, comprehensive, and inherently consistent. He narrated the substance of that conversation with ease and in response to the general question, "[W]hat happened next and when?" Regarding credibility, Thomas' response to my question about the subject conversation was impressive. Specifically, I asked whether Thomas had responded to Nichols' alleged unlawful motivation. Thomas answered he told Nichols that "as long as I did my job I had the right to associate with whatever people I wanted to and get involved in whatever kind of activities I felt was important to do." I consider this response entirely consistent with Thomas' description of what was said by Nichols. It bears the mark of probity. Clearly, Thomas is a vigorous union proponent. The response he claimed he gave Nichols may be expected from one whose union advocacy has been challenged. Moreover, Nichols, who testified after Thomas,

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[4] 250 NLRB 692. At the hearing, I denied the General Counsel's request that I take official notice of Administrative Law Judge Frank's decision. On July 17, 1980, after the instant hearing closed, the Board issued its Decision and Order upon Administrative Law Judge Frank's decision. In her post-hearing brief, counsel for the General Counsel renewed her former requests. It is now proper for me to take official notice of the prior case. *Delchamps, Inc.*, 234 NLRB 262 (1978); *West Point Manufacturing Company, Wellington Mill Division*, 142 NLRB 1161, fn. 3 (1963); *Plant City Welding and Tank Company*, 123 NLRB 1146, 1150 (1959).

[5] Judge Frank found Lamkin was "the employee primarily responsible for initiating the Union's organizational drive." The Board adopted Administrative Law Judge Frank's conclusion that Lamkin had been discriminatorily discharged. Thus, the Board ordered that Lamkin (among others) be offered immediate and full reinstatement and be made whole for all losses incurred as a result of the discriminatory discharge.

[6] The recitation of facts relevant to the allegations of independent 8(a)(1) violations and those pertaining to Thomas' alleged discriminatory layoff are a composite of factual stipulations, unrefuted oral testimony, supporting documents and other undisputed evidence. For the sake of brevity, only those facts deemed material are set forth. Not every bit of evidence is discussed. Nonetheless, I have considered all of it together with all arguments of counsel. Omitted matter is considered irrelevant or superfluous.

was not asked to deny that Thomas responded to the alleged unlawful remark or to give a different version of Thomas' response. Thus, Thomas' account is uncontradicted.

I find Nichols vague, equivocal, and selective in his testimony of the June conversation with Thomas. Thus, as the above transcript abstract shows, Nichols answered "not really" to a multifaceted question regarding the conversation. Nichols' response then only was directed toward whether he made reference to Thomas as a troublemaker. Next, Respondent's counsel asked, "Did you ever say *that* to Mr.—"(Emphasis supplied.) Nichols' reply, "No, I didn't," is rendered meaningless because he prevented counsel from completing the question by interrupting him and because the ambiguity appearing by virtue of the italicized word creates uncertainty as to just what it is that Nichols sought to deny. Finally, Nichols ended his testimony of the conversation with a plain self-serving denial. Even the final denial was in response to a rather ambiguous question.

In its totality, Nichols' testimony of the subject conversation falls short of controverting the more lucid and straightforward version of Thomas. Indeed, careful scrutiny of Nichols' account shows he did not explicitly deny he made the alleged "low profile" comment.

In crediting Thomas over Nichols, I am not unmindful of evidence tending to show discrepancies in Thomas' testimony. Most noteworthy is Thomas' initial assertion that the only time he distributed leaflets at Respondent's gate was on November 26. During Thomas' cross-examination, he conceded his pretrial affidavit reflects he had engaged in such distribution "on six or seven occasions . . . since March. . . ." I consider this testimonial variation of slight value. It does not detract from Thomas' overall credibility. A trier of fact is not required to believe the entirety of a witness' testimony. *Maximum Precision Metal Products, Inc., Renault Stamping Ltd.*, 236 NLRB 1417 (1978). The stark specific differences in the respective presentations of Thomas and Nichols regarding the June conversation is the more accurate indicator of the relative veracity of those witnesses.

Finally, I find it plausible and likely that Nichols made the remarks attributed to him. The June conversation centered around Thomas' previous transfer requests. At the time of the conversation, Gartman, whom Thomas replaced, was still employed. Thus, whether Thomas would be transferred was still in doubt. During cross-examination, Nichols was asked whether he saw Thomas at the gate speaking with Mamber. Nichols answered, "There's a very good possibility, yes." All these circumstances make it probable Nichols would have counseled Thomas in the manner asserted by the General Counsel. Nichols virtually admitted knowledge of, and concern for, Thomas' association with Mamber. This conclusion is enhanced by reference to the Board decision of which I have taken official notice. In the earlier case, Nichols was found to have unlawfully created an impression that the employees' union activities were under surveillance. Though not dispositive of the issue, I consider Nichols' previous unlawful conduct a relevant factor in assessing his conduct herein. The Board left undisputed Administrative Law Judge Frank's conclusion that Nichols promoted Respondent's course of conduct which was held by the Board to be egregious. Such predisposition indicates that Nichols, subjectively, understood that vigorous pursuit of union activities by employees might hinder their employment opportunities. In this context, it is logical that he would have cautioned Thomas in the manner depicted by Thomas.

Upon all the foregoing, I find that, sometime in June, Nichols told Thomas he should keep a low profile regarding his union activities.

2. Analysis

The question presented by the independent 8(a)(1) allegation is whether Nichols' remark reasonably tends to have a proscribed effect. *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975); *Impact Die Casting Corporation*, 199 NLRB 268, 271 (1972). Thomas' response to Nichols reflects he was unshaken by what Nichols said. However, Thomas' reaction is irrelevant. *El Rancho Market*, 235 NLRB 468, 471 (1978).

I conclude Nichols' words impart fear that Thomas might not be granted his requested transfer because he was active on behalf of the Union. The clear implication of Nichols' comment is that continued union activities by Thomas would prevent or impede his transfer. In *Fetzer Broadcasting Company*, 227 NLRB 1377, 1380 (1977), an employer was held to have violated Section 8(a)(1) when its plant manager warned nonstriking employees they "would just be jeopardizing [themselves]" by associating with strikers or pickets. Herein, Nichols issued an analogous warning. In effect, he was warning Thomas his transfer request was in jeopardy because of his union activities. The evidence shows that, at that time, Nichols knew Thomas' union activities consisted of association with Mamber at Respondent's gate. Thus, it is virtually inescapable that Nichols' words connote a fear and apprehension that continued union activity could be detrimental to Thomas' request for transfer. Nichols' status as a supervisor and agent of Respondent is undisputed. Accordingly, his activities are imputable to Respondent.

Upon the foregoing, I find that Respondent violated Section 8(a)(1) of the Act by Nichols' telling Thomas, sometime in June, he should keep a low profile regarding his union activities.

C. *Thomas' Layoff*

1. Facts

During the morning of November 27, Emack walked through the die maintenance department. Thomas and employee Richard Courtois, Sr., were present. Courtois had been in Respondent's employ for 26 years. He had been a die maintenance employee for the past 19 years. Since his transfer into die maintenance, Thomas was being trained by Courtois.

While in the die maintenance department, Emack remarked die maintenance employees were not busy and there was not enough work to do.

After lunch on November 27, Thomas was called into Emack's office. There, Emack told Thomas he was laid off. Thomas testified, without contradiction, he asked

Emack if he could work the remainder of that week. According to Thomas, Emack rejected that suggestion. Thomas testified that Emack, instead, said his terminal checks had already been prepared. Emack indicated Thomas could leave the premises immediately, but would be paid for a full day's work.

Respondent's records reveal the existence of a heavy backlog of die maintenance work in July. As noted, Gartman quit his die maintenance job during that month. Undisputedly, Thomas had been a competent worker. His transfer request was outstanding. Apparently, the combination of these factors resulted in his transfer to the die maintenance department.

Before Thomas' transfer, Respondent began to reduce its work force. Thus, between May and November 27, the total employee complement in the production and maintenance unit was reduced from 246 to 158 employees. Thirty-three employees had been laid off between June 28 and November 27.

The amount of work required in the die maintenance department is directly proportional to that available in the die-cast department. From May through November there was a steady decline in die-cast man-hours worked. During that time, those man-hours were reduced from 1,776 per week to 717 man-hours per week.

Concurrently, the number of hours the die-cast machines were operating was reduced. Those hours were reduced to less than 600 per week from 931 hours during the week ending May 6. They sharply dropped from an average of 851 hours per week in May, to 802 hours per week in June, to 735 hours per week in July, to 623 hours per week in August, to 615 hours per week in September, to 543 hours per week in October, and to 471 hours per week in November.

On October 12, seven die-cast machine operators were laid off. At that time, a backlog of die maintenance work existed. Courtois and Thomas worked in die maintenance on the first shift. Keith Mohammed worked in die maintenance on the second shift. Courtois' seniority was the greatest. Next, came Mohammed.[7]

Thornton testified he knew of the slowdown in die-cast operations. Thornton regularly monitored Respondent's inventory. Based on his observations, Thornton "recommended" to his supervisors and departmental managers that they effectuate an increase or decrease in production. It was left to the subordinate managerial officials to implement Thornton's recommendations in the way most appropriate to them.

According to Thornton, it was not until November 26 that he personally saw the full extent of the reduction in die maintenance backlog. Thornton testified the reduction was at "a critical stage." On that date, Thornton instructed Emack to reduce the overhead in die maintenance. There is no direct evidence that Thornton specifically directed Emack on the way this should be done.

[7] There is evidence that two other individuals were working in die maintenance on the first shift immediately preceding, and on the day of, Thomas' layoff. I conclude that fact tangential, inasmuch as I credit Respondent's claim they were working there temporarily to set up shelving and their performance of regular die maintenance functions merely was incidental to the reason for the temporary assignment.

Emack made the decision to lay off Thomas. Emack testified that layoffs are made on seniority when all other factors are equal. In essence, Emack's determination who should be laid off are based on his personal judgment of overall competence of the employees. He engages in no prescribed review of records. Thus, Emack testified, "I have a pretty good idea of who the best man is."

Emack decided to lay off Thomas after consideration of abilities and length of employment of the employees in die maintenance. He particularly used the following factors as to Thomas: (a) the greater departmental seniority of both Courtois and Mohammed, (b) the fact Mohammed was the sole second-shift die maintenance employee, and (c) the fact Thomas was still in the learning stages of die maintenance work and functioned as Courtois' helper. Emack testified a review of these elements made Thomas "the logical man to go."

The record reflects Thomas had not been replaced. Only Courtois and Mohammed worked in die maintenance after Thomas' layoff until April 1980. Then, Mohammed was promoted to foreman in die-cast maintenance. Thomas was then offered reinstatement to replace Mohammed. Thomas declined. Since then, Courtois remained the only die maintenance employee.

2. Analysis

Respondent contends Thomas was laid off solely due to lack of die maintenance work. The General Counsel claims the asserted reason for the layoff is pretextual. Resolution of these positions is governed by the following applicable legal principles.

The General Counsel must prove certain elements to establish a *prima facie* case of discrimination. Those elements are that (1) the affected employee had engaged in activity protected by the Act, (2) the Employer had knowledge of that activity, (3) the adverse personnel action imposed upon the employee was motivated by union animus, and (4) that the discipline had the effect of encouraging or discouraging membership in a labor organization. The General Counsel has the burden of proving his case by a preponderance of the evidence. *Gonic Manufacturing Company, Division of Hampshire Woolen Company*, 141 NLRB 201, 209 (1963).

The 8(a)(1) violations support findings of unlawful motivation. I have found that Respondent violated Section 8(a)(1) when Nichols told Thomas to keep a low profile in his union activities. Assuming I am in error in that finding, 8(a)(1) violations are not necessarily a requirement of an 8(a)(3) finding. "Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such case . . . the trier of fact may infer motive from the total circumstances proved. . . . If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—at least where . . . the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966). The *Shattuck Denn* principle was

quoted with approval by the Board in *Best Products Company, Inc.*, 236 NLRB 1024, 1025 (1978).

Support for a finding of unlawful motivation "is augmented [when] the explanation of the [employer's conduct] offered by the Respondent [does] not stand up under scrutiny." *N.L.R.B.* v. *Bird Mach. Co.*, 161 F.2d 589, 592 (1st Cir. 1947).

The instant allegation requires me to determine, from the totality of evidence, whether the asserted reason for Thomas' layoff actually motivated it. *Signal Delivery Service, Inc.*, 226 NLRB 843 (1976).

Undeniably, there is ample record evidence Thomas had been engaged in a variety of protected activity. Thus, he was a leader of the walkout in March and a spokesman for other employees, he was vocal regarding working conditions during departmental meetings, and, finally, he engaged in distribution of leaflets on behalf of the Union on November 26. In any event, Respondent does not seriously argue an evidentiary failure of this *prima facie* element.

Respondent's knowledge of Thomas' protected activity is disputed. Emack and Thornton disclaimed they saw Thomas leafleting on November 26. Thomas and Mamber testified Thornton went through the gate during the leafleting. I credit them. When asked whether he saw Thomas at the gate on November 26, Thornton was equivocal. He responded, "I do not recall seeing him [Thomas] at the gate." There was only one gate to Respondent's plant. Given Respondent's concern over the union activities of its employees manifested by its earlier violations (250 NLRB 692), it is unlikely the leafleting activities of November 26 and the participants in it would have gone unnoticed. Accordingly, I infer Respondent had direct knowledge of Thomas' leafleting activities on November 26.

Assuming, *arguendo*, Thornton is credited, there is other evidence of Respondent's knowledge. Thus, other supervisors, such as Gangini, passed through the gate during the leafleting. Gangini was Thomas' immediate supervisor. Gangini did not testify at the hearing. In these circumstances, it is reasonable to infer, as I do, that Gangini's testimony would have been adverse to Respondent had he testified. *Interstate Circuit, Inc., et al.* v. *United States*, 306 U.S. 208 (1939); *Monahan Ford Corporation of Flushing*, 173 NLRB 204 (1968); *Crow Cravel Co.*, 168 NLRB 1040, 1047 (1967).

As to knowledge, the parties have focused their arguments on the November 26 activities. However, my conclusions are predicated on the entire record. I cannot isolate Thomas' earlier activities. Accordingly, I further conclude that Nichols' unlawful remark to Thomas in June is additional evidence that Respondent knew of Thomas' union activities. Still further evidence of Thomas' protected activities exists by virtue of Emack's participation in a conversation with Thomas as spokesman for the other employees who walked out in March and also from Thomas' vocal expressions concerning working conditions in Nichols' presence, during departmental meetings.

I conclude that the General Counsel has established the requisite element of antiunion hostility. Two bases are present for this conclusion. First, I have found Nichols' statement that Thomas should keep a low profile a violation of the Act. Second, Administrative Law Judge Frank's decision, approved by the Board in 250 NLRB 692, is replete with evidence of animus. The Board will take official notice of its own prior decisions which involve the same parties and similar issues. *Moulton Manufacturing Company*, 152 NLRB 196, 207 (1965). Thus, I take official notice the Board has approved Administrative Law Judge Frank's findings. Moreover, the Board agreed with Administrative Law Judge Frank's conclusion the unfair labor practices committed by Respondent warranted a broad cease-and-desist order. There is no evidence in the instant record to show any alteration in Respondent's position regarding union activities of its employees from that exhibited in the cases before Administrative Law Judge Frank.

The General Counsel's claim that Respondent's defense is a pretext poses a close question. Respondent's able counsel adduced considerable evidence in support of Respondent's economic defense. That unrefuted evidence includes impressive elements of proof. Additionally, there are other significant factors which militate in favor of finding merit to Respondent's contentions:

(a) Thus, though Thomas was an employee leader during the March work stoppage, Respondent later granted his transfer request. This reduces the strength of an inference that Respondent was motivated by antipathy toward protected activities.

(b) Historically, the first shift in the die maintenance department regularly was staffed by Courtois as the only employee working there. This fact supports Respondent's claim that no more than one employee was needed during a period of reduced backlog.

(c) The evidence establishes the need for a layoff in die maintenance. Since June, Respondent engaged in a program of staff reduction. The backlog in die maintenance which existed at Thomas' transfer virtually had been diminished. Thomas was only 1 of 33 employees laid off during the implementation of the overall program to reduce the production and maintenance work force. Indeed, the General Counsel concedes the existence of Respondent's premise of staff reduction.

(d) The decision that Thomas would be the employee to be laid off apparently was made in conformity with preexisting and customary standards. Thus, where competency was not in question, seniority governed layoffs. Undeniably, Thomas was both the least senior and experienced die maintenance employee.

(e) No one was hired to replace Thomas. This fact lends support to Respondent's claim that the reduced workload in die maintenance necessitated a layoff.

(f) When Mohammed was promoted, Thomas was offered reinstatement. This fact has some slight impact upon the existence of Respondent's animus.

(g) Respondent was consistent. No attempt has been made to provide a variety (shifting) of reasons for its action against Thomas. At his terminal interview, Thomas was advised by Emack that his layoff was for lack of work. Also, Emack told Thomas he might be recalled if business improved. The documentary evidence (payroll change form) confirms Emack's testimony in

this regard. That document contains notations that the layoff was attributed to lack of work and confirms Emack's remark concerning potential for recall.

Viewed in isolation, the sum of Respondent's economic evidence is impressive. It shows the existence of a need to reduce die maintenance overhead. Further, Respondent's evidence shows such a need was dictated by a general decline in Respondent's production requirements. Arguably, then, the layoff in the die maintenance department simply was a continuation of the layoff pattern in progress since May. In these circumstances, the selection of Thomas for layoff could be a natural consequence.

However, the situation does not rest on the foregoing discussion. The validity of the economic defense is not to be determined by such superficial analysis. Thus, Respondent's evidence must be assessed together with that presented by the General Counsel. If such examination reflects the existence of valid business reasons for the layoff but nonetheless reasonably demonstrates that a substantial and motivating ground for Thomas' layoff was his protected activity, the General Counsel should prevail. *Dilene Answering Service, Inc.*, 222 NLRB 462 (1976); *KBM Electronics, Inc., t/a Carsounds*, 218 NLRB 1352, 1358 (1975); *N.L.R.B.* v. *Whitin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953).

Evaluation of the record, in its totality, persuades me the General Counsel should prevail. In reaching this conclusion, I am particularly influenced by the following considerations:

(1) Thomas' layoff was precipitous. It followed Thomas' November 26 leafleting by only 1 day. Coincidence in protected activity and adverse personnel actions against employees is a strong factor supporting an inference of unlawful motivation. *McGraw-Edison Company* v. *N.L.R.B.*, 419 F.2d 67 (8th Cir. 1969); *N.L.R.B.* v. *Harry F. Berggren & Sons, Inc.*, 406 F.2d 239, 245 (8th Cir. 1969), cert. denied 396 U.S. 823.

(2) The reason propounded by Thornton and Emack for selecting November 27 as the layoff date is unconvincing. Each of these managerial officials impressed me as responsible and alert officials. Thus, characteristically, Thornton signified he regularly monitored the production and maintenance workload. He described the situation in the die maintenance department as "critical" on November 26. It is illogical that Thornton permitted the die maintenance department to deteriorate to the deplorable condition he asserted. I find this circumstance contrary to the apparent business acumen otherwise demonstrated by Thornton. It suggests that the asserted discovery of the severe conditions in the die maintenance department on November 26 (the very day of Thomas' leafleting) is a fabrication. Moreover, the failure to grant Thomas' request to complete his workweek is unexplained.

(3) Respondent has not satisfactorily explained why the date of November 27 had been selected for Thomas' layoff. As already noted, I have found it implausible that the die maintenance workload was not more accurately observed before November 26. Respondent's brief asserts that a layoff in that department was "inevitable" since October 12. On this date, several die-cast machine operators had been laid off. In this context, I find there has been no satisfactory explanation for a 6-week delay in effectuating Thomas' layoff.

(4) Respondent displayed an adverse reaction to Thomas' protected activities. Nichols' June "low-profile" remark, found unlawful, reflects Respondent's predisposition to interfere with the exercise of his Section 7 rights. Thomas' first overt exercise of those rights after Nichols made his comment was on November 26. Respondent's reaction was swift. In all the circumstances, I find Nichols' remark interrelated with the layoff.

(5) Respondent has a propensity to violate the Act. The Board's decision in 250 NLRB 692, involving Respondent and the instant Charging Party, may be considered herein. Indeed, I consider it unrealistic to ignore Respondent's past misconduct. I have accorded it some, but not dispositive, weight. *Metlox Manufacturing Company*, 225 NLRB 1317, 1325 (1976); *Tama Meat Packing Corp.*, 230 NLRB 116 (1977).

(6) Thomas was the only employee currently at work whose union activity was notorious. Mamber was assisted in the November 26 distribution of literature by Thomas and former employee Lamkin. At that time, Administrative Law Judge Frank had declared Respondent violated the Act, in part, by having earlier discharged Lamkin.[8] I consider Thomas' open association with the Union and Lamkin on November 26 somewhat significant in establishing Respondent's true motivation for Thomas' layoff. It is circumstantial evidence which provides some insight to the impetus for Respondent's precipitous conduct.

In sum, I conclude the record sufficiently demonstrates the asserted defense is pretextual. It follows the reason ascribed by Respondent for Thomas' layoff is unlawful. *Keller Manufacturing Company, Inc.*, 237 NLRB 712, 717 (1978) (as to Alice Meyers). Accordingly, I find the record contains a preponderance of evidence to show that Thomas' November 27 layoff was in violation of Section 8(a)(3) and (1) of the Act.

Further, I conclude the consequence of Thomas' layoff reasonably has the proscribed effect of discouraging employee union activity. The layoff, having occurred only 1 day after Thomas distributed union literature, surely signaled to other employees the potential risks of freely expressing union sympathies. This is precisely the inhibiting effect the Act is designed to protect against.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act when Nichols, its personnel manager, told Thomas, its

[8] In 250 NLRB 692, the Board left Administrative Law Judge Frank's determination undisputed.

employee, to keep a low profile regarding his union activities in June 1979.

4. By laying off Lawrence Thomas on November 27, 1979, Respondent discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(3) and (1) of the Act, I shall recommend it cease and desist from engaging in such conduct in the future and affirmatively take such action as will dissipate the effects of its unfair labor practices.

Because Thomas' November 27 layoff has been found unlawful, the Order shall require Respondent to offer him full and immediate reinstatement to his former or substantially equivalent job, without prejudice to his seniority or other rights and privileges; and to make him whole for any loss of earnings he may have suffered as a result of the discrimination by payment of a sum equal to that which he would have earned, absent the discrimination, to the date of Respondent's offer of reinstatement. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

As previously noted, the Board (250 NLRB 692) held Respondent engaged in such extensive and egregious unfair labor practices as warranted a broad cease-and-desist order. The events of the earlier cases occurred more than 1 year before those litigated herein. As earlier noted, no evidence was adduced to show Respondent's labor relations posture had changed before Thomas' layoff. Thornton, Emack, and Nichols were all Respondent's supervisors during the earlier ligitated matters. Each was involved, directly or indirectly, in the activities which the Board has held unlawful.

Herein, I have found that Respondent has once again committed an independent 8(a)(1) violation. Also, it has been found Thomas' layoff is another example of Respondent's continued discriminatory treatment of its employees.

The events herein cannot be judged in isolation. I view Thomas' leafleting activity as an extension of the organizational efforts of 1978 as fully described in Administrative Law Judge Frank's decision. That decision was the subject of the leaflet distributed by Thomas.

Herein, there simply is no basis to find Respondent has recanted from its previous strenuous and illegal opposition to its employees' union activity. Indeed, the swift layoff imposed on Thomas reflects the continuing vitality of Respondent's aversion to free exercise of Section 7 rights. As shown hereinabove, Respondent's warning to Thomas and his subsequent layoff are further evidence of its complete disregard for employees' statutory rights. This is especially true when coupled with the Board's determination in 250 NLRB 692.[9] Moreover, the repetitious character of the discriminatory conduct found unlawful in the instant matter punctuates the need to eliminate future recurrences. Accordingly, I conclude it is necessary that the Order herein be coextensive with the degree of past misconduct and the threat of prospective reiteration.

The demonstrated proclivity to violate the Act warrants a broad proscriptive order. Thus, the Order shall require Respondent to refrain from, in any other manner, interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Upon the above findings of fact, conclusions of law, the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Magnesium Casting Company, Inc., Hyde Park, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against its employees for engaging in union or other activity protected by the Act.

(b) Telling its employees to keep a low profile regarding their union activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights might be affected by a lawful union-security agreement in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer Lawrence Thomas immediate and full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges,[11] and make him whole in the manner described above in the section entitled "The Remedy" for any loss of pay or other benefits suffered by reason of his discriminatory layoff on November 27, 1979.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other re-

[9] See *Brooks Cameras, Inc.*, 250 NLRB 820 (1980).

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] If it is determined the reinstatement offer made to Thomas upon Mohammed's promotion in April 1980 was *bona fide*, no additional offer of reinstatement need be made and the backpay hereunder shall be computed in accordance with the Board's procedures in such cases. Similarly, if the reinstatement offer was *bona fide* the next-to-last paragraph of the notice attached hereto as an Appendix should be deleted and the following paragraph substituted:

> "WE HAVE OFFERED LAWRENCE THOMAS reinstatement to his former or substantially equivalent job with us, without loss of seniority or other rights, privileges and benefits; and we will make him whole, with interest, for all loss of pay and other benefits he suffered as a result of his discriminatory layoff on November 27, 1979."

cords necessary to analyze the amount of backpay and interest due under the terms of this Order.

(c) Post at its Hyde Park, Massachusetts, location copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."